

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ANTHONY McFERREN, :CIVIL ACTION
Petitioner :No. 1:05-cv-66

v. : '07 JAN -5 A11:31
SUPERINTENDENT TENNIS, ET AL., :
Respondent : CLERK
WESTERN DISTRICT COURT

MOTION TO VACATE ORDER AND PERMISSION
TO HEAR NUNC PRO TUNC OBJECTION TO REPORT AND RECOMMENDATION

AND NOW, comes, Anthony McFerren, (Petitioner), who files the instant Motion to Vacate Order and Permission to file Objection to Report and Recommendation, in support thereof represents the following:

1. This Honorable Court issued an order dismissing the writ of Habeas Corpus and denied a COA on December 25, 2006. See exhibit (a) attached.
2. The body of the Memorandum order states petitioner had until December 21, 2006 to file Objection..to date no objection was filed.
3. Petitioner asserts as evidenced by the attached Affidavit that he delivered the Objections to the U.S. Mailbox at S.C.I. Rockview for delivery on December 19, 2006 to the Clerk of the U.S. District Court and the Prosecution in Crawford County. See Exhibit (b) attached hereto.
4. Petitioner asserts that he has filed the necessary complaints with S.C.I. Rockview, specifically, Mr. Dougherty of the Business Office and Mr. Boone whom is in charge of the inmate mailroom.
5. Petitioner asserts as soon as the verification is complete by the prison of the date the funds were removed from the Petitioner's inmate account for the cost of postage upon all parties he will provide same to this Court and

the Prosecution.

6. Petitioner has attached exhibit (c), being his personal copy of the inmate postage slip which inmates must utilize for legal mail.

7. Petitioner asserts exhibit (d) attached is a true and correct copy of the Petitioner's Objection to the Report and Recommendation. The Certificate of Service clearly demonstrates under the penalty of perjury that Petitioner placed the envelop which contained the Objections in the U.S. Mailbox. Id.

8. Petitioner asserts due the Christmas holiday's the prison's mailroom ran slow, thus, since the mailroom is now outside of the prison no mail is sent out to the Altoona Post Office timely. This internal mailing system is beyond this inmates control. Id.

9. Petitioner submits if this matter is not corrected he will suffer substantial prejudice, inasmuch as under the present state of law, this will be Petitioner's only opportunity to have the substantive merits of his Constitutional claims addressed. Id.

10. Accordingly, this Court in its legal discretion can vacate its Order of December 26, 2006, pursuant to F.R. Civ. Proc., Rule 59(e). This Court thus, as the optional Motion under Rule 60(b)(4)(6) to vacate the order and hear the Objections Nunc Pro Tunc.

11. It is well settled, since Petitioner is actually in litigation in a federal forum, Rule 6(a) applies. State Bank and Trust Co. v. Inversion Grrrazuiz, 374 F.3d 158 (2004); Rouse v. Lee, 314 F.3d 698 (2003).

12. In addition, the mailbox rule applies to the petitioner's case before this Honorable Court. Safold v. Newland, 250 F.3d 1262 (2005). See also F.R.A.P. Rule 25(c).

13. Petitioner submits this Court may have already received the objections and the envelop should bear a postage stamp between the 20th or 21st of

December, 2006. This is a material fact since the DOC deducted funds from the Petitioner's inmate account for postage on this Court and the Prosecution. Id.

14. Accordingly, this matter is clearly excusable neglect under Rule 4(c) Of the F.R.A.P.

15. Nunc Pro Tunc Objections have been permitted under circumstances in which are beyond the inmates control. Satterfield v. Johnson, 434 F.3d 185 (3rd Cir. 2006), which in the interest and ends of justice Petitioner should be permitted an opportunity to have his Objections to the Report and Recommendation reviewed on the merits.

CONCLUSION

It is respectfully prayed this Honorable Court vacate its Order of December 26, 2006, and Grant Nunc Pro Tunc Relief to hear the Petitioner's Objections to the Report and Recommendation.

Respectfully submitted,

Anthony McFarren

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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

ANTHONY McFERREN,
Petitioner,
v.
SUPERINTENDENT TENNIS, et al.,
Respondents. } Civil Action No. 05-66 Erie

MEMORANDUM ORDER

This petition for writ of habeas corpus was received by the Clerk of Court on February 25, 2005 and was referred to United States Magistrate Judge Susan Paradise Baxter for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The Magistrate Judge's Report and Recommendation, filed on November 7, 2006, recommended that the petition for writ of habeas corpus be dismissed and that a certificate of appealability be denied. The parties were allowed ten (10) days from the date of service to file objections. Service was made on Petitioner by certified mail at SCI Rockview, where he is incarcerated, and on Respondent. Petitioner subsequently requested and was granted an extension of time until December 21, 2006 in which to file objections to Magistrate Judge Baxter's Report and Recommendation. To date, he has filed no objections. After de novo review of the petition and documents in the case, together with the Report and Recommendation, the following order is entered:

AND NOW, this 26th day of December, 2006,

IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus is DISMISSED and that a certificate of appealability is DENIED.

EXHIBIT A

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The Report and Recommendation of Magistrate Judge Baxter, filed on November 7, 2006 is adopted as the opinion of the Court.

s/ Sean J. McLaughlin
United States District Judge

cm: All parties of record
Susan Paradise Baxter, U.S. Magistrate Judge

Case 1:05-cv-00066-SJM-SPB Document 12-1 Filed 12/26/2006 Page 2 of 2

The Report and Recommendation of Magistrate Judge Baxter, filed on November 7, 2006 is adopted as the opinion of the Court.

s/ Sean J. McLaughlin
United States District Judge

cm: All parties of record
Susan Paradise Baxter, U.S. Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ANTHONY MCFERREN, :No. 05-66ERIE

Petitioner :

v. :

SUPERINTENDENT TENNIS, et al., :

Respondent :

AFFIDAVIT

I, Anthony McFerren, hereby state under the penalty of perjury pursuant to 28 U.S.C. §1746, that I filed Objections to the Report and Recommendation by placing same in the United States Mailbox at S.C.I. Rockview, for U.S. Mail delivery upon the Clerk of the United States District Court and the Respondent, being the prosecutor of Crawford County.

I, Anthony McFerren further state under the penalty of perjury that I have filed all necessary grievances with S.C.I. Rockview and for official verification on the date the Objections were actually sent through the outside Post Office, and for official receipts, which I am awaiting an answer. This declaration is being made this 1st day of January, 2007.

s/ A. McFerren

Anthony McFerren

Exhibit 6-

SCI ROCKVIEW - POSTAGE RECEIPT

TO BE COMPLETED BY INMATE:

Clerk U.S. Dist. Court
Person to whom mail is sent

Anthony McFerren AK-7607 D
Inmate Name Number Block Date 12-19-06

TO BE COMPLETED BY MAILROOM:

Amount of Postage

Date

Signature

Exhibit C

CERTIFICATE OF SERVICE

The undersigned, hereby certifies that he served the within documents for delivery upon the persons indicated, through the internal mailing system at S.C.I. Rockview, this 4th day of January, 2007, which is made under the penalty of perjury.

CLERK OF COURTS
UNITED STATES DISTRICT COURT

U.S. COURTHOUSE
STATE STREET (original and one copy)
ERIE, PA 16501

Douglas W. Ferguson, Esq.
District Attorney (1-copy)
Crawford County Courthouse
Meadville, Pa

s/ A. McFerren
Anthony McFerren